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MICHAEL RODAK, JR.,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1426

UNITED TRANSPORTATION UNION, a labor organization, (UTU), A. H. CHESSER, President, (UTU), R. W. GUY, General Chairman, (UTU), G. R. PERKINS, General Chairman, (UTU), R. H. WOODHAMS, Vice General Chairman, (UTU), JOHN R. BURGE, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,

Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
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No.

UNITED TRANSPORTATION UNION, a labor organization, (UTU), A. H. CHESSER, President, (UTU), R. W. GUY, General Chairman, (UTU), G. R. PERKINS, General Chairman, (UTU), R. H. WOODHAMS, Vice General Chairman, (UTU), JOHN R. BURGE, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,
Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, United Transportation Union, a labor organization, prays that a Writ of Certiorari issue to

review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case No. 72-2013 on February 4, 1974.

OPINIONS OF THE COURTS BELOW

The opinions of the Courts below are attached hereto and labeled Appendices A and B.

As stated in the opinion of the Ninth Circuit, in November, 1961, certain herder (switchmen) agreements were entered into between Southern Pacific and its switchmen, giving the switchmen exclusive rights to align switches in the performance of herding work and prohibiting the performance of this work by road crews.

The evidence presented to the trial judge in the District Court was entirely by affidavits and declarations. These declarations related to the negotiation of a national agreement which was not resolved until January, 1972. In negotiating the national agreement, President Biaggini of the Southern Pacific in negotiating the agreement with Charles Luna, the president assured Mr. Luna that he need not worry about the situation in the newly merged union, as Article 9 of the newly proposed agreement would not be applied by the Southern Pacific to displace herders, or if any, only a very few in the back shop and roundhouse areas. Relying on these representations of Mr. Biaggini, the president of the United Transportation Union signed the agreement, including Article 9, and

thereafter Southern Pacific abolished some sixteen herder jobs, including various herders situated where Mr. Biaggini said they would not be affected. (Kesecker affidavit, R.T. p. 155; Burge affidavit, R.T. p. 158; Burge affidavit, R.T. p. 134; Blazin affidavit, R.T. p. 92).

As stated by the Court of Appeals, the Union asserts that the District Court erred in that the undisputed record evidence required the District Court to deny all equitable relief to Southern Pacific because:

> "(1) [Southern Pacific] should be by the conduct of its president estopped to claim such relief because of its misrepresentations and bad faith in connection with the inception of the agreement on which the railroad relies.
>
> "(2) Because of fraudulent and mistaken representations so made at the inception of the agreement."

PARTIES' CONTENTIONS

We summarize Union's contentions as follows:

(a) That Article IX does not incorporate a separate oral agreement with Southern Pacific concerning its herders and was reached and made during the course of the national bargaining negotiations. Hence, Article IX is not a binding agreement between these parties under the rationale of *Anaconda Wire and Cable Company v. National Labor Relations Board,* 444 F.2d 1028 (7th Cir. 1971).

(b) Mr. Biaggini as president of Southern Pacific made certain false representations as to the number of herder positions which would be abolished under the proposed Article IX. That the Union relied in good faith upon those false representations and ceased further collective bargaining on the Article. Hence, Southern Pacific should be estopped to implement the Article adverse to those representations under the rationale of *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, citing *Insurance Co. v. Wilkinson,* 13 Wall. 222.

Accordingly, Union urges that the 1961 herder agreements with Southern Pacific are legally still effective and the dispute looks to a new agreement concerning switchmen-herder duty assignments and falls within the "major dispute" category as delineated in *Switchmen's Union of North America v. Southern Pacific Co.,* 398 F. 2d 443 (9th Cir. 1968) at page 445, citing *Elgin, J. & E. Railway Co. v. Burley, et al.,* 325 U.S. 711, 723. Therefore, the restraint is violative of the Norris-LaGuardia Act, 29 U.S.C. §108.

Southern Pacific denies the actionable false statement factual premise urged by Union and further contends that:

(a) the National Agreement superseded the 1961 herder agreements, hence, Article IX is a valid subsisting agreement between the disputing parties, and

(b) the dispute arises from its reasonably susceptible implementation of Article IX and is a "minor dispute" within the jurisdiction of the Adjustment Board.

Accordingly, Southern Pacific contends that the restraint was proper under the rationale and holdings of *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156 (D. C. Circuit 1972), cited and followed in *Southern Pacific Transportation Co. v. International Brotherhood of Electrical Workers, et al.*, 474 F.2d 696 (9th Cir. 1973).

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the interpretation of the Railway Labor Act, 45 U.S.C.A., Sec. 151, and the Norris-LaGuardia Act, 29 U.S.C.A., Sec. 108. There is an issue as to whether this is a major or minor dispute under the tests set out in *Elgin Joliette & Eastern Railroad v. Burley*, 325 U.S. 711 (1954) and also under the Norris-LaGuardia Act as to whether or not there was bargaining in good faith.

THE LAW

THE DISPUTE WHICH MOTIVATED THE LAWFUL STRIKE ACTION AROSE OVER THE RAILROAD COMPANY'S DENIAL OF THE FORMATION AND EXISTENCE OF SPECIAL HERDER AGREEMENTS WHICH MODIFIED ARTICLE IX, §1 OF THE NATIONAL AGREEMENT, AND HENCE IS A MAJOR LABOR DISPUTE.

In considering the threshold issue of the magnitude of the dispute, defendants submit that the basic au-

thority defining major and minor disputes, *Elgin, J. & E. R. R. v. Burley,* 325 U.S. 711 (1954), supports their position. The Court stated regarding major disputes:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."

In the instant case, the affidavits of the defendants establish that a separate oral agreement was reached with the president of the Southern Pacific which varied the terms of Article IX, §1 of the national agreement. The parties clearly contemplated in the national agreement that other agreements might be reached. Article XV, §2(e) of the national agreement provides as follows:

> "This article will not debar management and committees on individual railroads from agreeing upon any subject of mutual interest."

It is a well-settled principle of law that several agreements connected in fact and in subject matter can be considered in evidencing the intent of the parties.

Schell v. Fauche, 138 U.S. 52, 34 L.Ed. 1040;
Salmon Falls Mfg. Co. v. Goddard, 14 L.Ed. 493.

It is further well settled that the parol evidence rule was never intended to perpetrate a fraud, and therefore parol evidence will be allowed to reform contracts entered into by mistake or fraud and to make them correspond to the intent of the parties.

Walden v. Skinner, 101 U.S. 577, 25 L.Ed. 963.

Parol evidence may show that the parties did not intend the written paper to be a complete and final statement of the whole transaction.

Seits v. Brewers Reefer Machine Co., 35 L.Ed. 836.

And in the recent case of *Anaconda Wire & Cable v. N.L.R.B.,* 444 F.2d 1028 (1971), it was held that the employer is legally obligated to incorporate into writing any agreement reached during the negotiations. In the case at bar, the affidavits of defendants reveal repeated efforts of the defendants to meet with the employer which were frustrated on every occasion. The national agreement itself has attached to it, as shown by the affidavit of L. W. Sloan, several agreements which modify the terms of the national agreement, yet the plaintiff refuses to acknowledge the fact that any agreement was negotiated or is in existence concerning the special herder agreements of 1961. Interpretation is not the issue, since the plaintiff denies the formation or existence of the agreement which modified the terms of the national agreement.

ESTOPPEL ARGUMENT

THE PRINCIPLE OF ESTOPPEL APPLIES TO PRESIDENT BIAGGINI'S STATEMENT

Defendants in good faith relied on the representations of the president of the Southern Pacific; and therefore the Norris-LaGuardia Act and the Railway Labor Act, 45 U.S.C.A. §151, et seq., protect the rights of the defendants to strike in this instance. By relying on the representations of the president of Southern Pacific, the defendants ceased further collective bargaining negotiations regarding the herder agreement, which it must be assumed would have continued had these special agreements not been protected. It is clearly the policy of the law to encourage negotiations and collective bargaining to settle labor disputes. When the union officials and membership relied on the representations of management, collective bargaining as to that issue was terminated. When the plaintiff failed to acknowledge the formation or existence of those representations and agreement after the national agreement was implemented, they foreclosed the union from collective bargaining negotiations. The plaintiff further, by failing to acknowledge that these representations and agreements were actually made, undermined the confidence that the union membership had in its leaders to engage in meaningful collective bargaining negotiations, and thus would destroy the basic concept of negotiating procedure. Therefore, the only alternative in this regard was a lawful strike by the union acting in good faith upon reliance of representations made by the company which were not acknowledged; and

this action is supported by the most recent authority of *Delaware & Hudson Ry. Co., et al. v. U.T.U.,* 450 F.2d 603 (Mar. 31, 1971).

This situation brings into play the rule as set forth in *Union Mutual Life Ins. Co. v. Wilkinson,* 13 Wall. 222, 233, 20 L.Ed. 617, 622:

> "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

The above quotation was cited with approval in the case of *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 3 L.Ed.2d 770, 79 S.Ct. 760, where the Court held that the railroad was estopped to take advantage of misrepresentations of a claim agent in his dealings with an injured man. In the *Glus* case, the plaintiff had waited to file his action until the statute of limitations had run, but the Court held that "despite the delay in filing his suit, petitioner is entitled to have his cause filed on the merits if he can prove that respondent's responsible agents, agents with some authority in the particular matter, con-

ducted themselves in such a way that petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued."

Similarly, in the case at bar, we believe these authorities are applicable in reference to the binding effect of the representations of President Biaggini on the railroad and their estoppel to deny the effect of these representations. The Court of Appeals would disregard this phase of established law and class these contentions as "nonsense".

ARGUMENT

The parties to this lawsuit had pursued the procedures required by the Railway Labor Act without resolution of the dispute. At that time, both parties had authority to resort to the ultimate right of self help. See *Delaware & Hudson Ry. Co. v. U.T.U.*, 450 F.2d 603 (cert. den. June 7, 1971), holding that it was not unlawful for the union to pursue a selective strike and reversing the preliminary injunction.

The railroad does not come into court with clean hands to seek an injunction. The representation of President Biaggini of the Southern Pacific followed by removal of the herders constituted bad faith bargaining, and later this was confirmed by his marked reluctance to meet and talk with the union representatives or to keep appointments made (R.T. p. 79). See *Southern Ry. v. B. of L.F. & E.*, 384 F.2d 323 regard-

ing the requirement of good faith bargaining and also *Atlantic & West Point v. U.T.U.*, 307 F.S. 1205.

The conduct of President Biaggini and the later conduct of the railroad as to herders constituted a form of bad faith bargaining which was as bad as a refusal to bargain. It prevented further bargaining and kept the union from being able to meet the issue.

Mr. Biaggini admits in his affidavit and agrees that Southern Pacific would so apply the agreement as to have no substantial effect on herder positions, with the exception that the railroad did expect to discontinue positions of herders working on inside tracks and handling switches in connection with the movement of engines to and from ready tracks and engine houses, roundhouses, and shop areas. He further stated that it would not be Southern Pacific's intention to apply the agreement so as to eliminate herder positions where the men were used to tend switches which were used where trains were entering and leaving the yards at various locations (R.T. p. 145).

The affidavits of Kesecker (R.T. p. 155), Blazin (R.T. p. 95), Holland (R.T. p. 57), Burge (R.T. p. 81) show that the herders removed by Southern Pacific were not confined to those in roundhouse or shop areas, but included the ones which Mr. Biaggini stated would not be affected. President Biaggini by his own admission had told President Luna and Mr. Burge, the representative of his employees, not to worry about this, and that there would be "no substantial effect on herders' positions," and he referred to the positions which have subsequently been abol-

ished. (See Burge affidavit, R.T. p. 158 regarding inside herders.) This conduct flies in the face of *U.S. v. Fidelity Casualty of N. Y.*, 402 F.2d 893:

> "The principle is that where one party has by his conduct induced the other party to a transaction to give him an advantage which would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage."

This Court in equity should not allow the technical advantage thus obtained to be set up and relied on to defeat the ends of justice or to establish an unfair claim. The affidavits of all the employees, including Hayden (R.T. p. 97), Holland (R.T. p. 57), Kesecker (R.T. p. 59), Cody (R.T. p. 55), Lechner (R.T. p. 71), and Presidents Luna (R.T. p. 62) and Chesser (R.T. p. 66) show that the representation of President Biaggini was relied on by the organization and further collective bargaining was discontinued with this representation having been given.

We do not have here a mere question of interpretation, which would make a minor issue for the Adjustment Board. We have "the creation of a new agreement," looking to the future, as is referred to in the *Burley* case, supra. This oral commitment looked to the future in keeping the old agreement in effect rather than Article IX. It was not a mere question of the meaning of Article IX, but of the existence of an agreement as to the future and how it was to be applied. This is an abrupt change from the way in which Article IX was actually applied, and is the opposite of the national agreement, and so is not a

matter of mere interpretation. The railroad sought to explain it away by saying that the statement of their president was "conversation of one not directly involved in labor relations who is normally not even a participant in negotiations." The president of the railroad certainly was a competent spokesman for the railroad and was so chosen under the last section of Article IX of the National Agreement. He had the right to recognize that the old "special rules" would remain in effect; and their national agreement so contemplated by having this special section in it, reading as follows:

> "Section 2. The foregoing is not intended to impose restrictions with respect to any operation where restrictions did not exist prior to the date of this agreement. . . ."

Even the National Agreement had appended to it several separate Letters of Understanding. (See Exhibit A attached to "Entry 8" of Clerk's Transcript).

The evidence shows without dispute that after Mr. Biaggini had made these representations, the union leaders relied upon them and broadcasted to their membership and the interested members just what Mr. Biaggini had stated and were thereby lulled into a false sense of security. Being unaware of the consequences of this reliance, they ceased to bargain on the question and their only remedy was to strike when they found out that they had changed their position to their detriment with their reliance on the statement of President Biaggini. President Biaggini admits he did involve himself in this matter, and

that he did represent that the way the agreement would be applied would have no practical effect on the herders and to continue the special rules in effect. It would appear that the parties have a right to rely on what the president of the railroad admittedly has said and that they did rely upon it, to their detriment. There is no equity in granting an injunction to the railroad under such circumstances. The statement made was either false or mistaken; there was reliance and damage, all of which give the essential elements of fraud or misrepresentation in the inducement to the contract, which should allow reformation rather than an injunction under the rule of *Walden v. Skinner,* supra.

The parties here were involved under the rule of the *Burley* case, in a major dispute looking to the acquisition of rights for the future and not merely to the assertion of rights claimed vested in the past. They were in a dispute about a formal change in terms relating to the creation of a new agreement and not merely as to the meanings or the application of a particular past agreement. The rule is well stated in *S.U. of N.A. v. S.P.,* 398 F.2d 443:

> "Major disputes are those which relate to the formation of collective bargaining agreements or efforts to secure them. . . . A dispute is major only if an effort is made to bring about a formal change in the terms of an existing agreement or create a new agreement."

Section 8 of the Norris-LaGuardia Act, 29 U.S.C.A. §108, precludes injunctive relief if the railroad has

failed to fulfill its legal obligations, which include a showing of good faith. See *Rutland R.R. v. B. of L.E.*, 307 F.2d 21, which applies the "clean hands doctrine in a court of equity involving injunctive relief as to labor contracts; and inequitable conduct will not be condoned."

CONCLUSION

We respectfully request this court to review this case and to reaffirm the doctrine of estoppel of the *Wilkinson* and *Glus* cases so firmly embedded in our law that the railroad cannot take advantage of its own misrepresentations and still claim that it has bargained in good faith.

Dated, Oakland, California,
March 22, 1974.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioners.

HILDEBRAND, MCLEOD & NELSON, INC.,
Of Counsel.

(Appendices Follow)

In the United States District Court for the Northern District of California

Civil No. C-72-429 RFP

Southern Pacific Transportation Company, a corporation,
Plaintiff,
vs.
United Transportation Union, a labor organization, (UTU), et al.,
Defendants.

[Filed Apr. 3, 1972]

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came on to be heard upon plaintiff's application for a preliminary injunction and upon this Court's order to show cause and temporary restraining order issued March 10, 1972, the Court having considered the verified complaint, amended complaint and affidavits filed herein and arguments of counsel and being fully advised in the premises.

The Court finds that defendants caused and participated in a strike and work stoppage against plaintiff by taking concerted action to picket and strike plaintiff's lines of railroad in the States of California,

Oregon, Nevada, Utah, Texas and elsewhere on March 10, 1972, and that such strike and work stoppage caused plaintiff to curtail and eliminate transportation services and resulted in immediate and irreparable injury, loss and damage to plaintiff, to plaintiff's customers and to the public.

The Court further finds that on March 13, 1972, defendants engaged in a concerted layoff and work stoppage at Oakland, California, in order to force plaintiff to concede or acquiesce in defendants' interpretation of the work rules contained in the collective bargaining agreement between the parties dated January 27, 1972, and are likely to engage in other concerted layoffs, strikes and pressures in order to accomplish the object of forcing plaintiff to acquiesce to defendants' interpretation of said work rules. Said concerted layoff or work stoppage caused plaintiff to curtail and eliminate transportation services and resulted in immediate and irreparable injury, loss and damage to plaintiff, its customers and to the public, which injury and loss will continue unless further work stoppages are enjoined.

The Court further finds that if defendants are not enjoined from further striking they will cause the withdrawal of all of plaintiff's employees represented by defendants, plaintiff's operations will be paralyzed; that plaintiff will be forced to curtail or eliminate its services necessary to the transportation of perishable products and goods and property of California industries and of industries of other states, that plaintiff will be forced to curtail or eliminate its

passenger, mail and baggage services to the detriment of the public and the United States Government, which products, goods, properties, passengers, mail and baggage are continuously and necessarily carried by plaintiff to and from points throughout the United States; that plaintiff, its employees, the industries affected, interested railroads, the public and the United States Government will be deprived of large amounts of revenue and of supplies for the armed forces in Vietnam, of other defense materials, foodstuffs, goods, mail, baggage and other property which are daily carried by plaintiffs; that plaintiff's employees who are not interested in the subject matter of this case will be laid off and subjected to substantial loss of wages by the continuance of such strike; that such damages cannot be wholly estimated, calculated or compensated for in money, and that said damages will be immediate, substantial and irreparable. Said damages will be irreparable in that money damages will not compensate for injuries to the national defense effort in Vietnam nor be adequate compensation for the loss of business, livelihood, and service to the carrier, shippers, passengers, employees and the general public.

The Court further finds that the disputes and grievances which are the basis of defendants' strike and work stoppage do not concern changes in agreements, but instead concern the interpretation and application of existing agreements covering rates of pay, rules and working conditions and are minor disputes for which defendants have an appropriate ad-

ministrative procedure for handling with plaintiff. The Court further finds that this matter has been submitted to the National Railroad Adjustment Board for arbitration.

The Court concludes that the strike and work stoppages were conducted and caused by defendants in violation of the Railway Labor Act, 45 U.S.C. 151, et seq., and the issuance of a preliminary injunction is appropriate in these circumstances.

Now, Therefore, It Is Ordered that the defendants and all persons in active concert and participation with them, and all persons acting by, with, through or under them, or by their order, be and they are hereby restrained and enjoined from the following in furtherance of the disputes and grievances herein found by the Court to be minor disputes:

(1) threatening, calling, instigating, authorizing, encouraging, participating in, approving or continuing a strike, concerted layoff or other work stoppage, against the plaintiff and all acts in furtherance or in support thereof because of a dispute concerning the interpretation or application of the work rules contained in the agreement of January 27, 1972, between plaintiff and defendants;

(2) picketing or bannering the premises on which plaintiff conducts its operations, including the entrances and any other places where said premises are situated, from interfering with ingress to or egress from said premises, including the delivery, unloading, loading, dispatch

and movement of plaintiff's rolling stock and equipment and the contents thereof, or from loitering or congregating at or near any approaches thereto, and upon any public street or highway leading to or from any place which the employees of plaintiff or those having business with the plaintiff desire to enter or leave en route to or from said premises because of a dispute concerning the interpretation or application of the work rules contained in the agreement of January 27, 1972, between plaintiff and defendants;

(3) slowing down, laying off, or interfering with in anywise or manner the orderly and prompt continuance of work in plaintiff's operations because of dispute concerning the interpretation or application of the work rules contained in the agreement of January 27, 1972, between plaintiff and defendants;

(4) in any way carrying out or effectuating or conspiring to carry out or effectuate the activities enjoined in subdivisions (1), (2) and (3) hereof.

It Is Further Ordered that said defendants and each of them take all steps within their power to avert and prevent the resumption of the strike and work stoppage.

It Is Further Ordered that this Preliminary Injunction shall not be construed to require an individual to render service without his consent or to

make the quitting or resigning of an individual employee of plaintiff an illegal act.

It Is Further Ordered that this Preliminary Injunction is on condition that a bond be filed by plaintiff herein in the sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained. Said bond to be approved by the Clerk of this Court, or by the Court.

Dated: April 3, 1972.

/s/ Robert F. Peckham
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 72-2013

Southern Pacific Transportation Company, a corporation,
Plaintiff-Appellee,

vs.

United Transportation Union, a labor organization, (UTU), A. H. Chesser, President, (UTU), R. W. Guy, General Chairman, (UTU), G. R. Perkins, General Chairman, (UTU), R. H. Woodhams, Vice General Chairman, (UTU), John R. Burge, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,
Defendants-Appellants.

[February 1, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST,* Senior District Judge.

EAST, Senior District Judge:

THE CASE

The defendants-appellants (Union) are, for our purposes, the representatives of the Switchmen em-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

ployees of the plaintiff-appellee (Southern Pacific) and appeal from the District Court's order dated April 3, 1972, granting a restraint of a strike called and being conducted by the Union against Southern Pacific.

A brief narration of background history is warranted. In November of 1961, certain herder[1] agreements were entered into between Southern Pacific and the Switchmen, giving switchmen exclusive right to line switches in the performance of herding work and prohibiting the performance of this work by road crews. These agreements remained in effect until purportedly superseded by a National Agreement reached on August 2, 1971. The terms of the National Agreement were bargained for and negotiated over a period of nearly two years following a distressing national 18-day strike against the railroads, and the National Agreement was contentiously bargained for and provided that the national railroads would give the Union a 42 per cent wage hike in return for relaxation of a number of old contract work rules that had plagued the railroad industry by restricting work assignments to certain crafts within the Union. Because of a delay by proceedings for approval of the wage increases before the Pay Board, the 1971 agreement did not be-

[1]"Herders are taken from the ranks of switchmen and in fact, are switchmen, who perform yard service, usually by working alone, detaching engines from arriving road trains; lining necessary switches for movement of road engines to and from trains and roundhouse facilities; to allow trains and light engines to move into and out of tracks at ends of yards and line switches in roundhouse areas for movement of engines within such areas." Bush Affidavit dated March 10, 1972.

come effective until January 27, 1972. Immediately thereafter, the increases were paid to Union members and the nation's railroads sought to implement the new work rules and enjoy the consequent productivity increases. Specifically, Southern Pacific abolished sixteen herder positions pursuant to Article IX[2] of the National Agreement because they became unnecessary when Southern Pacific assigned its road crews (also represented by the Union) the work of attaching and detaching their engines to or from their road trains and line the switches necessary to move the engines between the engine service areas and the tracks where the trains rested, which work was theretofore performed by switchmen occupying the sixteen herder positions that were abolished.

The Union in turn called the subsequently enjoined strike even though none of the switchmen employed in the sixteen positions were laid off but all were absorbed into other work activities.

The District Court found that the dispute out of which the strike arose involved the interpretation and application of existing collective bargained agreements and, therefore, was a "minor dispute" as that term is used and applied to matters under the juris-

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[2]The pertinent parts are:

"*ARTICLE IX—ROAD-YARD MOVEMENTS*

Section 1. Road freight crews may be required at any point where yard crews are employed to do any of the following as part of the road trip, paid for as such without any additional compensation and without penalty payments to yard crews, holsters, etc.: . . . handle engines to and from train to ready track and engine house including all units coupled and connected in multiple; . . . ."

diction of the Railway Labor Act, 45 U.S.C. §151, et seq. The injunction was to permit utilization of the compulsory arbitration procedures of Section 3 of the Act, 45 U.S.C. §153, which provides for submission of such disputes to the National Railroad Adjustment Board (Adjustment Board). The dispute itself was submitted to the Adjustment Board on March 19, 1972, and is now pending before that forum.

ASSIGNMENT OF ERROR

The Union asserts that the District Court erred in that the undisputed record evidence required the District Court to deny all equitable relief to Southern Pacific because:

> "(1) [Southern Pacific] should be by the conduct of its president estopped to claim such relief because of its misrepresentations and bad faith in connection with the inception of the agreement on which the railroad relies.
>
> "(2) Because of fraudulent and mistaken representations so made at the inception of the agreement."

PARTIES' CONTENTIONS

We summarize Union's contentions as follows:

(a) That Article IX does not incorporate a separate oral agreement with Southern Pacific concerning its herders and reached and made during the course of the national bargaining negotiations. Hence, Article IX is not a binding agreement between these parties under the rationale of *Anaconda Wire and*

Cable Company v. National Labor Relations Board, 444 F.2d 1028 (7th Cir. 1971).

(b) Mr. Biaggini as president of Southern Pacific made certain false representations as to the number of herder positions which would be abolished under the proposed Article IX. That the Union relied in good faith upon those false representations and ceased further collective bargaining on the Article. Hence, Southern Pacific should be estopped to implement the Article adverse to those representations under the rationale of *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, citing *Insurance Co. v. Wilkinson,* 13 Wall. 222.

Accordingly, Union urges that the 1961 herder agreements with Southern Pacific are legally still effective and the dispute looks to a new agreement concerning switchmen-herder duty assignments and falls within the "major dispute" category as delineated in *Switchmen's Union of North America v. Southern Pacific Co.,* 398 F.2d 443 (9th Cir. 1968) at page 445, citing *Elgin, J. & E. Railway Co. v. Burley, et al.,* 325 U.S. 711, 723. Therefore, the restraint is violative of the Norris-LaGuardia Act, 29 U.S.C. §108.

Southern Pacific denies the actionable false statement factual premise urged by Union and further contends that:

(a) the National Agreement superseded the 1961 herder agreements, hence, Article IX is a valid subsisting agreement between the disputing parties, and

(b) the dispute arises from its reasonably susceptible implementation of Article IX and is a "minor dispute" within the jurisdiction of the Adjustment Board.

Accordingly, the restraint was proper under the rationale and holdings of *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156 (D. C. Circuit 1972), cited and followed in *Southern Pacific Transportation Co. v. International Brotherhood of Electrical Workers, et al.*, 474 F.2d 696 (9th Cir. 1973). We agree and affirm.

DISCUSSION AND CONCLUSIONS

Union's Contention (a)

We decline to burden this opinion with the details of the high level national character of the collective bargaining terminating in the National Agreement. Suffice, we have considered and conclude that Union's contention (a) above is without merit in fact and at law.

Union's Contention (b)

Manifestly the survival of this contention rests wholly and solely upon the factual picture presented by the evidentiary record. Our search of the record discloses that on June 31, 1972, after the agreement was signed, John Burge, General Chairman of Union, on Southern Pacific's lines, contended for the first time to L. D. Bush, Assistant Manager of Labor Relations for Southern Pacific, that Union believed Article IX was not national in scope and did not apply

to Southern Pacific as it did to other railroads, and that the 1961 agreement was still in effect, relying on two short in duration bargaining telephone conversations had on or about August 16, 1971, first, between Mr. Biaggini and Mr. Luna, as President of Union, and secondly, between Mr. Biaggini and Mr. Burge. The substance of those two telephone conversations is reflected only through the affidavit form averments of the parties to the telephone conversations. The averments are in conflict as to the exact statements made by Mr. Biaggini.

On their fact, the claimed conversations, viewed in a light most favorable to the union, do not support its claims. They relate only to the manner in which Southern Pacific proposed to implement the terms of Article IX, once it became effective. There was no misunderstanding as to what Article IX says. Thus the conversations relate only to the meaning of the language of Article IX as it applies to Southern Pacific and its union employees. The union does not seek rescission or reformation of Article IX. It claims that, as between Southern Pacific and the union, Article IX does not exist. This is nonsense.

The District Court found and concluded "that the disputes and grievances which are the basis of [Union's] strike and work stoppage do not concern changes in agreements, *but instead concern the interpretation and application of existing agreements* (italics supplied) covering rates of pay, rules and working conditions and are minor disputes for which

[Union has] an appropriate administrative procedure for handling with [Southern Pacific]."

Finally, we conclude that:

(1) The District Court's finding is not clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure.

(2) The National Agreement superseded the 1961 herder agreements and that Article IX thereof is a valid subsisting agreement between the parties hereto.

(3) "[Article IX is] reasonable susceptible to the interpretation sought [implementation thereof] by [Southern Pacific]" and the District Court's conclusion that the dispute leading to the strike involved herein is a minor dispute suitable for resolution by the Adjustment Board is right and sound. *International* at 1173.

AFFIRMED.

APR 22 1974

MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1426

UNITED TRANSPORTATION UNION, a labor organization, (UTU), A. H. CHESSER, President, (UTU), R. W. GUY, General Chairman, (UTU), G. R. PERKINS, General Chairman, (UTU), R. H. WOODHAMS, Vice General Chairman, (UTU) JOHN R. BURGE, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,

Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1426

UNITED TRANSPORTATION UNION, a labor organization, (UTU), A. H. CHESSER, President, (UTU), R. W. GUY, General Chairman, (UTU), G. R. PERKINS, General Chairman, (UTU), R. H. WOODHAMS, Vice General Chairman, (UTU) JOHN R. BURGE, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,

Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

OPINIONS BELOW

The Appendices to the Petition for Certiorari ("Petition") accurately report the opinions below with one exception. The date "June 31, 1972" shown on Appendix B to the Petition, page XII, is a typographical error contained in the original 9th Circuit opinion. Subsequent to its issuance, the clerk of the 9th Circuit corrected the opinion by changing that date to "January 31, 1972".

QUESTION PRESENTED

Was the dispute over the meaning of Article IX of the 1971 National Agreement a "minor dispute", subject to compulsory arbitration under the Railway Labor Act (45 U.S.C. § 151, *et seq.*), so that the strike was properly enjoined under the rationale of *Brotherhood of Railroad Trainmen v. Chicago & I.R.R.*, 353 U.S. 30 (1957).

STATEMENT OF THE CASE

The switchmen of the United Transportation Union ("UTU") struck respondent Southern Pacific Transportation Company ("Southern Pacific") on March 10, 1972, because Southern Pacific had abolished sixteen "herder" positions made unnecessary by its use of road freight crews to perform certain work involved in moving road engines to and from roundhouses, engine terminals and engine service areas. Prior to January 27, 1972, that work had been performed by switchmen working in and around the yards.[1] On that date, the UTU and the bargaining representative of 104 railroads (including Southern Pacific) formally executed a new national agreement granting

1. "Switchmen" or "yardmen" work exclusively in or within short distances of the railroad yards moving cars and engines. They do not work in "through" or "road" freight trains. Their primary function is to switch or arrange cars and engines into trains for movement outside the yards. In addition, a small group of switchmen, commonly referred to as "herders", and usually working alone, have been assigned to line switches at various places around the yards and in the engine service and roundhouse areas. Prior to the effective date of the agreement in dispute, some switchmen were also assigned as herders to attach and detach engines to and from road freight trains and line the switches to allow the engines to move between the trains and the service areas. "Road freight crews", on the other hand, are composed of conductors and brakemen who work primarily outside the yards on road freight trains moving between railroad terminals. Switchmen, conductors and brakemen all belong to the UTU.

substantial wage increases in return for relaxation of certain restrictive work rules. Article IX of that agreement reads in part as follows:

> "ARTICLE IX—ROAD-YARD MOVEMENTS
> *Section 1.* Road freight crews may be required at any point where yard crews are employed to do any of the following as part of the road trip, paid for as such without any additional compensation and without penalty payments to yard crews, hostlers, etc.: . . . handle engines to and from train to ready track and engine house including all units coupled and connected in multiple; . . ."

The switchmen of the UTU struck Southern Pacific because the UTU claimed that Article IX did not apply to Southern Pacific and did not supersede certain agreements executed in 1961 which had awarded that work to switchmen, rather than road crews. The UTU did not strike any of the other 104 railroads who were a party to the same 1971 National Agreement.

Although the exact terms of the National Agreement were finalized and initialed by the national negotiators on August 2, 1971, the UTU's contention that it did not apply to Southern Pacific was *not* raised by the UTU until January 31, 1972, when John Burge, General Chairman of the switchmen on the Southern Pacific, first made that argument to Larry Bush, Assistant Manager of Labor Relations for Southern Pacific. Prior to that date, the switchmen on the Southern Pacific had *never* claimed that any part of the 1971 National Agreement did not apply to Southern Pacific switchmen.

The basis of Mr. Burge's belated claim was the recollection of Mr. Burge and Charles F. Luna, President of the

UTU, regarding two separate conversations that they each had with B. F. Biaggini, President of Southern Pacific Transportation Company, concerning how Article IX would be applied on the Southern Pacific.[2] Both conversations occurred after finalization of the terms of the agreement in August of 1971.[3]

As recognized by the 9th Circuit, even the UTU affidavits do not support their allegations of fraud and unfairness. (Opinion of the 9th Circuit, Appendix B to Petition, p. XIII) In his affidavit, Mr. Luna only claims that Mr. Biaggini said that it wouldn't be "easy to displace" herders and if he were able to displace them, it would only be a "very few in the backshop and roundhouse areas."[4] Likewise, Mr. Burge admits that during a short telephone conversation on August 16, 1971 (13 days after completion of the agreement and termination of the strike), Mr. Biaggini said that the jobs of herders that work in the "roundhouse areas" would be "abolished". However, Mr. Burge claims that he replied by telling Mr. Biaggini that those jobs could not be abolished and then terminated the conversation. Neither Mr. Burge, Mr. Luna nor any UTU witness claim

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2. The UTU's version of these conversations was presented solely by affidavit even though the District Court gave the UTU the opportunity to present the oral testimony of Messrs. Luna and Burge. For reference, their affidavits are attached hereto as appendices A and B, respectively.

3. The agreement was reached and initialed by the negotiators on August 2, 1971, after an 18 day strike which had paralyzed the nation's railroad system. The strike was terminated immediately thereafter and the members of the UTU returned to work on August 3, 1971. Because of a delay in securing Pay Board approval for the wage increases, the agreement was not formally executed until January 27, 1972.

4. Aff. of Luna, App. A, p. 3.

that Mr. Biaggini actually said that no herder jobs would be abolished.[5] In fact, their affidavits establish the contrary, i.e. that Mr. Biaggini told them that some herder jobs would be abolished.

Since neither Mr. Luna nor Mr. Burge testified that Mr. Biaggini actually promised that no herder jobs would be abolished, it is not necessary to quote from or summarize Mr. Biaggini's affidavit.[6] Suffice it to say that he denied ever promising that Southern Pacific would not abolish any herder jobs or forego the benefit of Article IX and testified that he told Messrs. Burge and Luna that Southern Pacific would indeed apply Article IX so as to adversely affect the jobs of "inside herders" working in and around engine terminals, roundhouses and engine service areas.

In substance, this case involves a situation where a national agreement was reached applicable to all of the nation's railroads, *including Southern Pacific*, a nationwide strike was terminated and 13 days later there was a telephone conversation about how one provision of the agreement would probably be applied on one railroad. That conversation, and a prior conversation, only concerned the application of that provision. There was no written or oral commitment made not to apply that provision.

It was not until six months later that the UTU on the Southern Pacific first contended that Article IX did not apply to Southern Pacific. Since that contention involved the interpretation and application of the existing national agreement, the courts below correctly found that the dispute was a minor dispute.

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5. Aff. of Burge, App. B, pp. 8-9.

6. The affidavit of Mr. Biaggini is attached hereto as Appendix C.

REASONS FOR DENYING CERTIORARI

The Petition Fails to Comply With Rule 23 of this Court

The Petition does not comply with various portions of Supreme Court Rule 23. Not only is the order required by Subsection (1) ignored, the "question" is not clearly presented, there is no concise statement of the material facts, and there is no argument specifically setting forth the alleged grounds for certiorari under Rule 19, all of which are required by portions of Rule 23. This failure to comply with the Rules of this court is a sufficient reason to deny the Petition under Rule 23(4).

There Are No Grounds for Certiorari

The Petition does not set forth any of the grounds for certiorari identified in Rule 19. The decision of the 9th Circuit does not conflict with any of the decisions of this court or the circuit courts. To the contrary, the decision is in complete conformity with all of the decisions of this court and the circuits defining major and minor disputes, including *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), the leading case on the subject.[7]

Defining first major and then minor disputes, the Court said:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

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7. Other consistent cases are *Brotherhood of Railroad Trainmen v. Chicago River & I. RR.*, 353 U.S. 30, *supra;* and *Slocum v. Delaware, L. & W. RR.*, 339 U.S. 239 (1950).

> "The second class, however, contemplates the existence of a collective agreement already concluded, or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." (p. 723) (Emphasis added.)

In using road crews to perform the herding work, Southern Pacific relied on an existing agreement, i.e. Article IX of the 1971 National Agreement. The UTU contended, on the other hand, that Article IX did not allow Southern Pacific (and only Southern Pacific) to use road crews for that work because of two conversations occurring after the terms of the agreement were finalized. No matter who is correct on the merits, the fact remains that the parties in this case disputed the "interpretation" and proper "application" of Article IX and the dispute, therefore, was a minor dispute. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 723.

The opinions of this court cited by the UTU are far afield from the issues involved in this case. All but one involved the principle that parol evidence may be introduced to establish the true meaning of a contract or deed.[8] The other case involved the general principle that the statute of limitations can be avoided by pleading and proving that the misrepresentations of a defendant lulled the plaintiff into allowing the statute to expire.[9] None of those cases

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8. *Schell v. Fauché*, 138 U.S. 52, 34 L.Ed. 1040 (1890); *Salmon Falls Mfg. Co. v. Goddard*, 14 L.Ed. 493 (1852); *Seitz v. Brewers' Refrigerating Machine Co.*, 35 L.Ed. 837 (1891); *Walden v. Skinner*, 101 U.S. 577, 25 L.Ed. 963 (1879); *Insurance Company v. Wilkinson*, 13 Wall. 222 (1871).

9. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959).

involved the major-minor disputes dichotomy and none of them conflict with the 9th Circuit's decision.

Similarly, the Petition does not even claim a *direct* conflict with any decisions of another circuit. Even if made, such a claim would be meritless.

The District Court and the 9th Circuit both concluded that the dispute over the interpretation and proper application of Article IX, in light of the various versions of the two conversations, was a minor dispute, subject to compulsory arbitration before the Adjustment Board. The 9th Circuit's decision was consistent with, and based upon, the reasoning contained in numerous other Circuit Court decisions.[10]

The Circuit Court cases cited by petitioners do not conflict with the 9th Circuit decision. Two of those cases had nothing to do with minor disputes or the Railway Labor Act, but involved "estoppel to plead the statute of limitations"[11] and the duty to execute agreements under the National Labor Relations Act.[12] Both cases are further inapplicable to this case because the 9th Circuit concluded herein that there was absolutely no evidence of any oral agreement not to apply Article IX.

The Railway Labor Act cases cited by petitioner are in no way in conflict, whether directly or only by dicta, with

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10. *E.g., International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156 (D.C. Cir. 1972); *Aaxico Airlines, Inc., v. Air Lines Pilots Ass'n., Internat'l* 331 F.2d 433 (5th Cir. 1964); and *United Transp. Union v. Burlington Northern, Inc.*, 458 F.2d 354 (8th Cir. 1972).

11. *U.S. v. Fidelity and Casualty Co. of N. Y.*, 402 F.2d 893 (4th Cir. 1968).

12. *Anaconda Wire and Cable Company v. N.L.R.B.*, 444 F.2d 1028 (7th Cir. 1971).

the decision of the 9th Circuit. Insofar as they discuss the "minor dispute" issue, they each follow the guidelines and principles adopted by the 9th Circuit below. As to the good faith bargaining requirement set forth in several of those cases, the UTU's discussion is irrelevant because there was no evidence below that Southern Pacific ever refused to meet and discuss the dispute after it was raised by Mr. Burge on January 31, 1972. Actually, the UTU itself was guilty of bad faith because it refused to discuss the dispute or process it via the grievance procedures in the contract. The UTU simply engaged in a surprise strike rather than submit the dispute to the contract grievance process and compulsory arbitration.

With regards to the UTU's contention that Article IX is not binding because of a separate oral agreement, there is nothing in the record that supports that contention. Neither Mr. Burge nor Mr. Luna even remotely suggest that Biaggini ever specifically agreed to forego the benefits of Article IX.

Petitioners' "detrimental reliance" contention is also without support in the record. As indicated by the 9th Circuit, on their face and viewed in a light most favorable to the UTU, their versions of the conversations do not support their reliance claims but relate only to "after-the-fact" conversations about how Southern Pacific would apply Article IX after its effective date. Since this case involved an injunction to enjoin a strike, the unions did not actually seek recision or reformation of the contract but really only claimed that, as to Southern Pacific, Article IX does not exist. In the words of the 9th Circuit, this was and is "nonsense". (App. to Petition, p. XIII).

Article IX is part of a national agreement between the UTU and most of the nation's railroads which granted a 42% wage hike to the members of the UTU. Article IX relaxes restrictive work rules by allowing the railroads to use road freight crews to perform work formerly performed by yard crews. Article IX was a part of the *quid pro quo* for the wage hike. Southern Pacific has been and is paying the increased wages required by the national agreement and the UTU does not want the wage increases rescinded. Thus, it is indeed nonsense for the UTU to simply argue that Article IX does not exist and that Southern Pacific did not receive the *quid pro quo* for the increased wages.

As stated above, a dispute over the interpretation and application of an existing agreement in which a railroad seeks to enjoy vested rights is a minor dispute. *Elgin, J. & E. Ry. v. Burley, supra.* A dispute is minor as long as it is "arguably covered" by an existing agreement[13] so that the railroad's defense is not "obviously insubstantial"[14] or frivolous.[15] Applying these tests, the District Court found that the dispute over the use of road crews did not "... concern changes in agreements, but instead concern[ed] the interpretation and application of existing agreements ... and was thus a minor dispute as that term is used under the Railway Labor Act. The decision was correct and consistent with the decisions of this court and does not conflict with any other circuit court decision.

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13. *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

14. *Southern Ry. v. Brotherhood of Locomotive Firemen and Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967).

15. *Airlines Stewards & S. Ass'n, Local 550 v. Caribbean Atl. A., Inc.*, 412 F.2d 289 (1st Cir. 1969).

The dispute was submitted to the Adjustment Board and was pending there at the time the injunction was issued. The Board with its expertise and understanding of the jargon of the railroad industry is well equipped to resolve the meaning of Article IX.[16] Clearly, the Adjustment Board, in interpreting Article IX, has jurisdiction to consider evidence of the conversations. In describing the expertise of the Adjustment Board, the 5th Circuit has stated:

> "*. . . Questions at issue in this case, such as custom and practice, contractual language, and parol evidence, are the grist for the decisional mill of the body* [the Adjustment Board] *created by Congress with primary jurisdiction over such matters.*" (Emphasis added.)[17]

Since the Adjustment Board is empowered to hear the parol evidence relating to the interpretation and application of Article IX, the UTU's arguments do not defeat the jurisdiction of that forum but serve only to emphasize that the dispute was a minor dispute.

No matter what the arguments of the UTU may be, the fact remains that the substance of the dispute involved the interpretation and application of Article IX, an existing contract. The 9th Circuit correctly recognized that the arguments of the UTU about the conversations occurring after the agreement was reached did not convert the dispute into a major dispute but referred only to the interpretation and application of Article IX and, therefore, the dispute was minor.

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16. *Slocum v. Delaware, L. & W. R.R.* 239 U.S. 289 (1950).

17. *Brotherhood of Locomotive Firemen and Enginemen v. Southern Pacific Co. (T. & L.L.)*, 447 F.2d 1127, 1136 (5th Cir. 1971).

CONCLUSION

For the foregoing reasons, the Petition For Certiorari should be denied.

Respectfully submitted,

WILLIAM R. DENTON
JOHN J. CORRIGAN
ROBERT S. BOGASON
Attorneys for Respondent

Appendix A

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1212 Broadway, Suite 830
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Telephone: (415) 451-6732
Attorneys for Defendants.

In the United States District Court
for the Northern District of California
Southern Division [sic]

AFFIDAVIT

City of Washington
District of Columbia—ss:

Charles Luna, being first duly sworn, deposes and says:

1. I was President of the Brotherhood of Railroad Trainmen from 1963 until 1969, and when that Brotherhood merged with the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America in 1969 to form the United Transportation Union, I became President of the United Transportation Union and served in that capacity until December 31, 1971.

2. As President of the United Transportation Union, I had general responsibility for the handling of the wage and rules dispute growing out of notices of the union served on October 20, 1969, and November 20, 1969, and proposals served by the railroads for concurrent handling therewith. Although the negotiations looking toward settlemen of this dispute were conducted prior to the middle of 1971 by a negotiating committee consisting of Vice Presidents and Assistant Presidents, in July of 1971 the union initiated a series of selective strikes. At that time, I assumed active direction of all matters relating to the

dispute and personally conducted the negotiations that eventuated in an agreement settling the dispute. These negotiations were eventually conducted by three railroad presidents who negotiated with me and in turn kept in touch with their negotiating committees, as I did with mine. These railroad presidents were W. H. Moore, President of Penn Central; W. Graham Claytor, Jr., President of the Southern Railway Company; and B. F. Biaggini, President of the Southern Pacific Company.

3. The negotiations which resulted in the agreement that eventually disposed of the dispute were concluded in August, 1971, but the agreement could not become effective until ratified in accordance with the ratification procedures of the United Transportation Union. The agreement was expeditiously submitted for ratification, but before the ratification procedures could be completed a question arose as to whether the agreement would be allowed to operate in its entirety under the wage control program initiated shortly after the negotiations had been concluded. Since the agreement had been negotiated to operate as a single package and the ratification procedures had been initiated on the assumption that the agreement would so operate, I impounded the ratification ballots until the question of the operation as a package had been resolved. That question was not resolved until January, 1972, and consequently the agreement was not executed until January 27, 1972.

4. Shortly after the negotiations had been concluded, a question arose as to whether ARTICLE IX, Section 1, of the national agreement had any effect on the herder agreements on the Southern Pacific Railroad. Herders are a part of the craft represented by the Switchmen's Union component of the United Transportation Union but are not "yard crews" as that term is used in the railroad industry. ARTICLE IX, Section 1, of the national agree-

ment provides that road freight crews may be required at points where yard crews are employed to do certain specified work in yards as part of the road trip, paid for as such and without penalty payment to yard crews. The herder agreements on the Southern Pacific give herders the exclusive right to perform herding work and prohibit its performance by road crews.

5. Early in August, 1971, the General Chairman on the Southern Pacific representing the Switchmen's Craft, Mr. J. R. Burge, raised the question whether ARTICLE IX, Section 1, modified the herder agreements. I did not believe that it made any substantial modification but in order to confirm my impression I checked with Mr. B. F. Biaggini, the President of the Southern Pacific Company, who had participated in the negotiation of the national agreement and was directly involved in the operation of the herder agreements on the Southern Pacific. Mr. Biaggini explained that the herder agreements were separate agreements that applied only on the Southern Pacific. He said that it was not going to be easy to displace any herders and that if he were able to displace any, it would only be a very few in the backshop and roundhouse areas. I relayed this information to Mr. Burge.

6. The United Transportation Union convention began on August 9, 1971, and Mr. Burge was in attendance at the convention. He again raised the question as to the impact of ARTICLE IX, Section 1, on the herder agreements and I thereupon telephoned Mr. Biaggini in the presence of Mr. Burge and Mr. Al H. Chesser (whom the convention selected as my successor as President). Mr. Biaggini repeated the substance of his earlier conversation with me and I then asked him also to tell it to Mr. Burge, which he did. Thereupon Mr. Chesser, Mr. Burge and I discussed the matter and were thoroughly satisfied

that ARTICLE IX, Section 1, of the national agreement would have practically no impact on the herder agreements.

7. Mr. Chesser, Mr. Burge and I felt completely reassured since the national agreement refers only to yard crews and we had Mr. Biaggini's assurance that this agreement could not and would not supersede the individual herder agreements on the Southern Pacific. We continued so assured throughout the period elapsing before the agreement was finally signed on January 27, 1972. By that date Mr. Chesser had succeeded me and he is the first signatory to the agreement for the United Transportation Union.

CHARLES LUNA
Charles Luna

Subscribed to and sworn to before me this third day of March, 1972.

ABCDEF G. HIJKLM
Notary Public

My commission expires: June 14, 1974

Appendix B

Hildebrand, McLeod & Nelson, Inc.
1212 Broadway, Suite 830
Oakland, California 94612
Telephone: (415) 451-6732
Attorneys for Defendants.

In the United States District Court
for the Northern District of California
Southern Division [sic]

Civil No. C-72-429 RFP

Southern Pacific Transportation Company,
a corporation,

Plaintiff,

vs.

United Transportation Union, et al.,

Defendants.

DECLARATION OF JOHN R. BURGE

I, JOHN R. BURGE, declare as follows:

1. My name is JOHN R. BURGE. I reside at 154 Camino de Herrera, San Anselmo, California and maintain an office at Room 504, 16 California Street, San Francisco, California for the General Adjustment Committee for Switchmen members of the United Transportation Union who are employed by Southern Pacific Transportation Company (Pacific Lines). I hired with Southern Pacific as brakeman on July 17, 1937; transferred to yard service and became a switchman February 2, 1940; was elected Local Chairman for switchmen at Sparks Yard on the Salt Lake Division of Southern Pacific in 1951; became an assistant to General Chairman in July of 1953; was elected General

Chairman Southern Pacific, Pacific Lines, in July of 1955 and have remained as General Chairman to this date. As General Chairman, it is my obligation to make and maintain agreements and promptly notify the members of the United Transportation Union whom I represent of any matters of interest in connection with adoption of new agreements or maintenance of same.

2. As General Chairman I am the principal officer of the General Committee of Adjustment for Switchmen on the Southern Pacific Transportation Company (Pacific Lines), which consists of some 26 Local Chairmen with jurisdiction in yards from Portland, Oregon to El Paso, Texas and points between serviced by Southern Pacific Transportation Company.

3. Prior to the United Transportation Union Convention, spokesmen for the United Transportation Union and the nations railroads were engaged in extensive bargaining of matters concerning wages and rules for employees of the nation's railroads who were members of United Transportation Union. During the latter stages of these negotiations, United Transportation Union was engaged in a series of selective strikes, and the bargaining process shifted from United Transportation Union's Wage and Rules Committee to President Charles Luna of United Transportation Union who dealt directly with three railroad presidents who acted as spokesmen for the nation's railroads. One of the three railroad presidents was Mr. Biaggini, President of Southern Pacific Transportation Company. Agreement was reached between Mr. Luna and the three railroad presidents for settlement of the issues involved. The selective strikes were ended and a return to work order was issued effective August 2, 1971.

4. On instructions of my General Committee, I attended United Transportation Union's Convention held in Miami,

Florida, August 9 to 25, 1971. At the convention it was my function to meet with my delegation from the Southern Pacific, conduct their caucus meetings, keep the delegation informed with respect to convention matters as well as other matters of interest. Caucus meetings of my delegation, which consisted of some 30 delegates and officers, were attended and conducted by me on August 11, 12 and 16, 1971.

5. Prior to the caucus meeting of August 12, 1971, I met with President Charles Luna of United Transportation Union, and we discussed terms and conditions of the proposed new National Work Rules Agreement with particular emphasis to Article IX, Road-Yard Movements, and what effect, if any, that rule could have to the 250 Yard herding jobs in existence on this railroad property. In substance, the conversation went as follows:

> Mr. Luna: "Burge, you don't have to worry about the yard herder jobs on the Southern Pacific. I have firm understanding with President Biaggini of Southern Pacific that none of those jobs will be abolished as a result of this road yard rule."
>
> Burge: "That's good news. I have already told our delegation that I believe our Special Rules were not superseded by the new Road-Yard Rule. Is that the basis of your understanding with Mr. Biaggini?"
>
> Mr. Luna: "Yes. The Special Rules in effect on the Southern Pacific covering use of switchmen and herders on line switches are the only ones of that kind in the railroad industry. I talked about these special rules with Mr. Biaggini when we reached our understanding."
>
> Burge: "O.K. I'm conducting our S.P. caucus this afternoon after the convention session, and I'll tell our delegation about this. By the way, do you have anything in writing from Mr. Biaggini about this?"

Mr. Luna: 'No, I don't feel I need it. But come by my office sometime during the convention. I'll get him on the telephone and get him to tell you the same thing."

Burge: "O.K."

At the caucus meeting of the Southern Pacific delegation held at approximately 4:30 p.m., August 12, 1971, some thirty delegates and officers were informed of the above conversation. Special Rules mentioned in the telephone conversation are reproduced and attached hereto as Exhibit "A."

On August 16, 1971, I had scheduled a meeting with President Charles Luna and was accompanied by A. R. Hayden who was a delegate from the U.T.U. Local at Klamath Falls, Oregon yard of Southern Pacific. In the room also at the time of our meeting was National Legislative Director Al H. Chesser of United Transportation Union, and Vice President George Lechner. Mr. Luna called Mr. Biaggini on the telephone and after talking with him a short period of time, I was invited by Mr. Luna to speak with Mr. Biaggini. In substance, the conversation was as follows:

Mr. Luna: "Here's Burge now. I'll let you speak to him. Tell him what you just told me about the herders."

Mr. Burge: "Hello, Mr. Biaggini. This is John Burge speaking."

Mr. Biaggini: "Burge, about the herders. I've told Mr. Luna and I'll tell you: There's nothing intended by these new rules that could cause any loss of yard herding jobs or work yard herding. The people that work out in the yards are protected because of the rules we have in effect out there."

Burge: "I'm glad to hear you say that."

Mr. Biaggini: "But those herders that work in the roundhouse areas, that is another matter. Those jobs will probably be abolished."

Burge: "Mr. Biaggini, the roundhouse or Diesel facility herder jobs are established by Special Letter Understanding Agreements. If you want to abolish those jobs, that's something that your people and I will have to discuss when we get back on the property. I'll turn the phone back to Mr. Luna now."

At the caucus meeting of the Southern Pacific delegates and officers held at approximately 4:30 p.m., August 16, 1971, I advised those attending, some thirty in number, of the above telephone conversation and of Mr. Biaggini's concern in connection with the roundhouse herding jobs. Copies of letter agreements which established the roundhouse herder jobs are attached hereto as Exhibit "B."

6. On my return to San Francisco following the United Transportation Union convention, I did not discuss this matter further with any officer of the Southern Pacific Company for the reason that the contract had not yet been ratified by United Transportation Union General Chairman. Following ratification by the General Chairman, the Wage Price Freeze raised questions if the contract could be put into existence. When it became known that the contract would become effective upon its being signed January 27, 1972, I contacted officers of the Southern Pacific Company to discuss various matters in connection with the new National Agreement.

7. On January 31, 1971, I telephoned Mr. L. D. Bush, Assistant Manager of Labor Relations for Southern Pacific Company and inquired of him if he had knowledge of the

understanding Mr. Biaggini had with Mr. Luna. Mr. Bush advised me he had no knowledge of any such understanding. I then informed Mr. Bush of the commitment Mr. Biaggini had made to Mr. Luna as a condition of reaching agreement in the National Wage and Rules matters. I asked Mr. Bush if he would contact Mr. Carl Ball, Assistant Vice President of Labor Relations, Southern Pacific Company, who was in Washington, D.C. at the time and request of Mr. Ball that he contact Mr. Biaggini who was also in Washington, D. C. I requested Mr. Bush to expedite his handling of the situation. Mr. Bush returned my call on February 2, 1972, and advised that Mr. Ball had contacted Maynard Parks, Chairman of the Western Carriers' Conference Committee, and that Maynard Parks later advised Mr. Bush that the new articles of the National Agreement were to be applied the same on all railroads in the United States. Mr. Bush advised me that insofar as he knew Mr. Ball had not contacted Mr. Biaggini in Washington, D. C.

On February 2, 1972, I discussed the situation with Mr. R. D. Spence, Vice President in charge of operations, Southern Pacific Company. Mr. Spence advised me he was aware of the situation as he had discussed it with Carl Ball within the past day or two. Mr. Spence also advised me he had not discussed the matter at any time with Mr. Biaggini and could not at this time, as Mr. Biaggini was on a trip to Mexico and would not return until February 9, 1972, and a discussion would be held at that time. I remarked to Mr. Spence that I expected the officers of Southern Pacific Company to honor the commitment made by Mr. Biaggini and suggested that any directives involving work instructions to roadmen working in yards where yardmen were employed would be consistent with the understanding Mr. Biaggini had with Mr. Luna in connection with the Agree-

ment signed by President Al H. Chesser on January 27, 1972, for United Transportation Union.

8. Commencing February 4, 1972, the Superintendents of the Southern Pacific Company's various Divisions started holding meetings at on-line points of the Southern Pacific Railroad advising of the manner in which the new National Rules were going to be applied. All of the Superintendents who held such meetings advised those attending, including Local chairmen representatives of this committee, that the new National Rules were to be applied the same as on any other railroad and that they knew of no understanding that President Biaggini had made with President Charles Luna.

9. I attempted to talk with Mr. Spence again on February 7, 1972, but he was busy. Later that same day, Lee Sloan, Manager of Labor Relations for Southern Pacific called and said that he, L. M. Fox, First Assistant Manager of Labor Relations, and L. D. Bush, Assistant Manager of Labor Relations, would meet with me at 10:00 a.m., February 8, 1972. I accepted, but at the same time advised Mr. Sloan that Mr. Luna and Mr. Al Chesser, the new President of United Transportation Union would be in San Francisco February 8 and 9, 1972 and that Mr. Luna, Mr. Chesser and I would like to meet with Mr. Biaggini and Mr. Spence on the afternoon of February 9, 1972. A time of 2:00 p.m. February 9, 1972, was tentatively agreed upon, and Mr. Sloan assured me that he would see that Mr. Biaggini knew of our desire that he be at the meeting.

At the meeting next day, February 8, 1972, between Messrs. Sloan, Fox and Bush, and myself and Vice Chairman Luis Gonzalez of my Committee, Mr. Sloan opened the meeting by asking what it was we wished to discuss with them. I advised him that the reason I had attempted to contact Mr. Spence February 7, 1972 was to be assured there

would be an opportunity for Mr. Luna and Mr. Chesser and myself to meet with Mr. Spence and Mr. Biaggini February 9, 1972. Mr. Sloan advised the meeting of 2:00 p.m. February 9, 1972 was confirmed and he would personally see that Mr. Biaggini had knowledge of our request for him to be at the meeting. Following that, the meeting of February 8, 1972, ended without further discussion on my part.

At 2:00 p.m. February 9, 1972, Mr. Luna, Mr. Chesser and myself appeared at the office of Mr. Spence in the Southern Pacific Building at No. One Market Street. Mr. Spence was present, but Mr. Biaggini was not. Mr. Spence remarked that Mr. Biaggini had departed for New York City some three hours earlier. Mr. Spence was then advised fully and specifically of the understanding Mr. Biaggini had with Mr. Luna and myself. Mr. Spence was also advised by Mr. Chesser that he, Mr. Chesser, fully expected the Southern Pacific Company to live up to the understanding Mr. Biaggini had with Mr. Luna and that the Agreement was signed January 27, 1972, with the full expectation that such understanding would be complied with. In fact, Mr. Chesser advised Mr. Spence that he, Chesser, would never have signed the agreement if he had any indication at all that Mr. Biaggini would not keep his commitment.

10. Following the implementation of the new National Agreement Work Rules February 11, 1972, the Southern Pacific Company immediately started the use of roadmen to do herding work and line switches in numerous yards on the property in connection with herding work, including Tucson, Arizona; San Francisco, California; Oakland, California; and Phoenix, Arizona.

11. At the conclusion of shifts started February 16, 1972, Southern Pacific's Superintendent with jurisdiction at Tucson, Arizona Yard, abolished Yard herding Jobs #199,

starting time 3:30 p.m.; #197, starting time 3:59 p.m.; #198, starting time 11:59 p.m.; #196, starting time 7:59 a.m., and Relief Yard Herding Job #211, various starting times.

At the conclusion of shifts started February 29, 1972, Southern Pacific's Superintendent with jurisdiction at San Francisco, California Yard abolished Yard herding Jobs #180, starting time 3:30 p.m., and #181, starting time 11:30 p.m.

At the conclusion of shifts started March 1 and 2, 1972, Southern Pacific's Superintendent with jurisdiction at Oakland, California, Yard abolished Yard Herding Jobs #70, starting time 7:59 a.m.; #68, starting time 7:59 a.m.; #80, starting time 3:59 p.m.; #81, starting time 3:59 p.m.; #90 starting time 11:59 p.m.; #91, starting time 11:59 p.m., and #R-79, starting times various.

At the conclusion of shifts started February 15, 1972, and February 16, 1972, carrier's Superintendent with jurisdiction at Phoenix, Arizona Yard abolished the third helper positions on Yard Jobs 605 and 615 starting time 7:59 a.m. and 3:59 p.m. The third helper had been assigned to perform a combination of helping and herding duties.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed at Oakland, California this 8th day of March, 1972.

JOHN R. BURGE

Appendix C

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Telephone: 362-1212

Attorneys for Plaintiff
Southern Pacific Transportation Company

In the United States District Court for the Northern District of California

Civil No. C-72-429 RFP

Southern Pacific Transportation Company, a corporation,

Plaintiff,

vs.

United Transportation Union, a labor organization, (UTU), et al.,

Defendants.

AFFIDAVIT OF B. F. BIAGGINI
AFFIDAVIT

State of California
City and County of San Francisco—ss.

1. My name is Benjamin F. Biaggini. I am President and Chief Executive Officer of the Southern Pacific Transportation Company. My place of business is One Market Street, San Francisco, California. I am also a member of the Board of Directors of the Association of American Railroads.

2. During the summer of 1971 the United Transportation Union began a series of selective strikes against certain United States railroads. The Southern Railway and Union Pacific were struck on July 16 and the Southern Pacific

and Norfolk and Western were struck on July 24. The loss of rail transportation in large sections of the country served by these major rail carriers began to assume major economic proportions during the latter part of July and as a result, the Department of Transportation, the Department of Labor, the Congress of the United States and the Administration became interested in bringing about a settlement of the dispute. On July 30, 1971, I attended a regularly scheduled meeting of the Board of Directors of the Association of American Railroads. On that same morning there was a meeting at the White House which was attended by the Secretary of Labor; the Secretary of Transportation; Assistant Secretary of Labor; Stephen Ailes representing the Association of American Railroads; Mr. John P. Hiltz, Jr., Chairman of the National Railway Labor Conference; and Mr. Charles Luna, who at that time was President of the United Transportation Union. Mr. Nixon was there.

3. After the meeting at the White House had been completed, William Usery, Jr., Assistant Secretary of Labor, came over to the meeting of the Directors of the Association of American Railroads and asked permission to address that meeting. He reported on what had taken place at the White House conference earlier that morning and expressed the concern of the President of the United States over the growing harm to the economy being caused by the spreading stoppage of rail service. He also stated that at the White House meeting Mr. Luna had expressed the opinion that he could settle the strike if he could negotiate directly with three railroad presidents rather than with the railroads' representatives in the National Railway Labor Conference. The three railroad executives mentioned by Mr. Luna were William H. Moore, Chief Executive Officer of the Penn Central, W. Graham Claytor, Jr., President of the Southern

Railway and I. After a short discussion it was agreed that the three of us would offer to meet with Mr. Luna and attempt to resolve the issues still outstanding in the dispute.

4. I mention these matters because labor negotiations in the railroad industry are not normally undertaken by a single chief executive officer or a group of chief executive officers. Collective bargaining is undertaken on a national scale between the representatives of the various labor organizations involved and the National Railway Labor Conference which is directed by a Chairman, who at that time was John P. Hiltz, Jr. However, in view of the serious posture of the situation, the three railroad presidents named agreed to and did begin negotiations with Mr. Luna on the night of July 30, 1971 in offices which had been set aside for that purpose in the Department of Labor, in Washington, D.C. Representatives of the negotiating committees of both labor and management were also available nearby in the same building for consultation as needed.

5. Negotiations continued through the nights of July 31 and August 1, 1971, and agreement was finally reached in the early morning hours of August 2. A return to work agreement was also drafted and signed which provided for a termination of the work stoppage at 12:01 p.m., local time, Monday, August 2, 1971.

6. Some time during the three night negotiating session and after consultation with his people Mr. Luna questioned me with respect to that portion of the draft of agreement that we were working on relating to road-yard movements. That portion eventually became Article IX of the agreement. Mr. Luna indicated that representatives of his committee had informed him that this article could result in the elimination of all herders jobs on Southern Pacific. After consultation with C. A. Ball, Assistant Vice Presi-

dent-Labor Relations of the Southern Pacific Transportation Company and a member of the National Railway Labor Conference, I told Mr. Luna that we would expect to implement that portion of the agreement under discussion (Article IX) on Southern Pacific in such a way as to have no substantial effect on herder positions with the exception that we did expect to discontinue positions of herders working on inside tracks and handling switches in connection with the movements of engines to and from ready tracks and engine houses, roundhouses, and shop areas. I expressed the opinion to him that some 17 to 20 jobs would be involved in the application of this particular part of the agreement. I also indicated that most of the herder positions on the Southern Pacific were used to tend switches which were used by trains in entering and leaving yards at various locations and that it would not be our intention to apply the agreement so as to eliminate these herder positions. No further questions were asked by Mr. Luna during the negotiating sessions regarding this phase or portion of the agreement which was in draft form at that time, and it was finally initialled on the morning of August 2, 1971 in substantially the form in which it exists in the completed agreement which was signed January 27, 1972.

7. On August 16, 1971, I received a telephone call from Mr. Charles Luna who was at the UTU Convention in Miami. Mr. Luna indicated that John Burge, who is General Chairman for the Switchmen on Southern Pacific Transportation Company, had some questions about the new UTU agreement and requested that I tell Mr. Burge what I had told him about Article IX, Section 1. He put Mr. Burge on the phone and I said to him:

> "We are looking at the section of this agreement which refers to road-yard service, is that right?"

He responded to the effect that we were. I said to him,

> "I expressed to Charlie Luna, and had it confirmed by Carl Ball, that this would not have any substantial effect on herders on the Southern Pacific. Now, we may have some inside herders around engine terminals who would be effected, but we are not talking about the herders down at the end of the yard who let trains in and out of the yards, and so forth."

Mr. Burge then talked about herding agreements on the Southern Pacific and indicated that herders in some of the roundhouses and shop areas were covered by special agreement. I responded,

> "Yes. Well I'm just bringing it up with the one possible exception that occurs to me. I don't know of a specific situation but in the ordinary situation where we've got a herder out at the end of the yard either at each end or one end and this man's duties are to throw switches to let trains in and out of the yard, that guy is not effected."

8. These short statements represent my side or portion of the telephone conversation with Mr. Burge and to my recollection I simply reiterated to him what I had told Mr. Luna during the negotiating session as to how Southern Pacific intended to implement Article IX, Section 1 of the agreement.

9. Mr. C. A. Ball was familiar with the conversations that I had with Mr. Luna in Washington, and I later told Mr. R. D. Spence, Vice President of Operations of Southern Pacific, about what took place during the negotiating session and my later telephone conversations with Messrs. Luna and Burge. Mr. Spence has assured me that in putting the

new contract in effect the procedures with respect to herders that were indicated to Mr. Luna and Mr. Burge have been followed. I have never at any time made agreement with Mr. Luna or Mr. Burge that Southern Pacific would forego the application of Article IX Section 1 of the new agreement, but merely indicated to them how Southern Pacific would apply the provisions of the agreement with respect to the herder positions on the property.

10. To the best of my knowledge and belief, the policy and intent that I expressed to them has been followed.

Dated: March 20, 1972.

B. F. Biaggini

Subscribed and sworn to before me this 20th day of March 1972.

Gene H. Ellinger
Notary Public in and for the
City and County of San Francisco,
State of California.

My Commission Expires July 11, 1975.